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July 1, 2002

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: STB Ex Parte No. 589, *Calculation of Variable Costs in Rate
Complaint Proceedings Involving Non-Class I Railroads*

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten (10) copies of the Comments of Western Coal Traffic League.

We have enclosed an additional hard copy of these Comments to be date-stamped and returned to the bearer of this letter. Thank you for your attention to this matter.

ENTERED
Office of Proceedings

JUL 1 2002

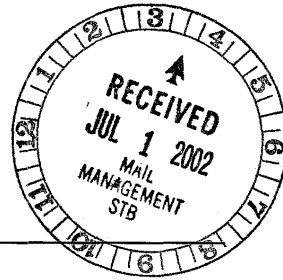
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Sincerely,

John H. LeSeur
An Attorney for
Western Coal Traffic League

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD



CALCULATIONS OF VARIABLE COSTS
IN RATE COMPLAINT PROCEEDINGS
INVOLVING NON-CLASS I RAILROADS

STB Ex Parte No. 589

COMMENTS OF
WESTERN COAL TRAFFIC LEAGUE

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Dated: July 1, 2002

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BEFORE THE
SURFACE TRANSPORTATION BOARD

CALCULATIONS OF VARIABLE COSTS
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STB Ex Parte No. 589

**COMMENTS OF
WESTERN COAL TRAFFIC LEAGUE**

The Western Coal Traffic League ("WCTL") submits the following comments in response to the Board's notice served April 30, 2001 ("Notice").

IDENTITY AND INTEREST

WCTL is a voluntary association whose membership is comprised of organizations which purchase and transport coal mined west of the Mississippi River.¹ WCTL members transport over 100 million tons of coal annually, nearly all of which moves by rail. WCTL has actively participated in numerous proceedings conducted by the Board, and its predecessor the Interstate Commerce Commission ("ICC"), involving the development of rail costs to be used in maximum rate cases.

This proceeding addresses the issue of how to develop Uniform Rail

¹ WCTL members include: Alliant Energy; Arizona Electric Power Cooperative, Inc.; Associated Electric Cooperative, Inc.; Central Louisiana Electric Company, Inc.; City of Austin, Texas; City Public Service Board of San Antonio; Kansas City Power & Light Company; Lower Colorado River Authority; MidAmerican Energy Company; Minnesota Power; Nebraska Public Power District; NRG Power Marketing Inc., Omaha Public Power District; Reliant Energy; Texas Municipal Power Agency; Western Resources, Inc.; Wisconsin Public Service Corporation; Xcel Energy.

Costing System (“URCS”) unit costs for non-Class I railroads. That issue was also before the Board in a recent case involving WCTL Member Minnesota Power. See STB Docket No. 42038, Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company, (“Minnesota Power”).

BACKGROUND

WCTL is aware of only three maximum-coal rate cases decided since the Staggers Act² involving non-Class I railroads where detailed cost evidence has been submitted: Minnesota Power, Moapa,³ and Westmoreland.⁴ In the later two cases, the involved non-Class I defendant railroads and complainant shippers utilized carrier-specific unit cost data to present their variable cost calculations to the ICC.

In Minnesota Power, the complainant shipper, Minnesota Power, developed its evidence of carrier-specific unit costs using the carrier’s internal records, and the defendant carrier, DMIR,⁵ developed its evidence of costs utilizing Class I carrier regional unit costs. The Board rejected both approaches. The Board found that “[t]he regional cost data used by DMIR are not representative of DMIR costs.” Minnesota Power, (Decision served March 6, 2000) at 5 (“Minnesota Power Decision”). The Board also found that Minnesota Power’s carrier-specific evidence flawed because, in the Board’s opinion, DMIR’s internal accounting records contained insufficient information to develop DMIR-specific URCS unit costs. Id. at 6.

² Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

³ Bituminous Coal -- Hiawatha, UT to Moapa, NV, 6 I.C.C.2d 1 (1989).

⁴ Westmoreland Coal Sales Co. v. Denver & R.G.W. R.R., 5 I.C.C.2d 1067 (1988).

⁵ Duluth, Missabe, and Iron Range Railway Company (“DMIR”).

The Board then devised a solution. Relying on its prior accounting precedents,⁶ the Board directed DMIR to “keep its records in compliance with our Uniform System of Accounts for [a] 12-month period.” Id. at 9. The STB subsequently issued two “housekeeping” stays of this decision (without readdressing the merits). The case ultimately settled without any further Board action on the merits.

THE BOARD’S PROPOSAL

The Board proposes to “return to a policy” of developing non-Class I carriers’ URCS unit costs using “available regional URCS cost data of Class I carriers.” Notice at 7. WCTL is aware of no such prior policy, nor did the Board cite to any such policy in its Minnesota Power Decision.⁷ The Board claims that a return to the prior policy is needed to prevent smaller railroads from being subjected “to inordinate adjudicatory expenses” and to prevent “regulatory delays.” Notice at 6. Both points appear to be directed at the Board’s Minnesota Power experience.

On the expense point, the cost of DMIR’s compliance with the Board’s accounting order in the Minnesota Power case was hotly disputed and Minnesota Power

⁶ See ICC Docket No. 37613, Elimination of Accounting & Reporting Requirements of Class II Railroads, (Decision served Feb. 25, 1982) (“Elimination of Accounting”); Montana Rail Link, Inc. & Wisconsin Central, Ltd., 8 I.C.C.2d 625, 634 (1992).

⁷ Indeed, in its Minnesota Power Decision, the Board concluded that governing precedents dictated exactly the opposite conclusion: the STB needs to obtain accurate movement-specific unit costs. The Board’s Notice cites to United States Department of Energy, et al. v. Baltimore & Ohio Railroad Company, et al., 10 I.C.C.2d 112 (1994) as an example where it had “historically” substituted carrier regional costs for individual railroad costs. However, that case involved a remand of an ICC decision where the District of Columbia Circuit found that the ICC erred in relying on average regional cost data. On remand, the Commission directed the parties to use regional surrogate costs “only where individual railroad data is unavailable.” Id. at 146.

itself offered to assist DMIR to collect the necessary data.⁸ Also, as Minnesota Power pointed out in its filings, the cost to Minnesota Power (in rate overpayments) would, over time, substantially exceed the costs to DMIR in collecting the data.⁹

The delay point also misses the mark. In several pending maximum rate cases, discovery disputes have resulted in case delays in excess of one year.¹⁰ Directing carriers to collect data for a year will not necessarily slow-down the current administration of STB maximum rate cases.

AN ALTERNATIVE

WCTL suggests that the Board not adopt its proposal as presented in the Notice. Instead, WCTL suggests that the Board require a shipper to set forth in its complaint in a maximum rate case involving a non-Class I railroad whether the shipper will present its cost evidence using regional costs (adjusted only by carrier-specific traffic and operating data) or whether it will present carrier-specific unit costs. If a shipper

⁸ See Docket No. 42038, Minnesota Power, Inc.'s Reply to Defendant's Petition for Reconsideration, (filed Apr. 10, 2000)(Public Version) at 7.

⁹ See Docket No. 42038, Minnesota Power, Inc.'s Reply to the April 4, 2000 Statement of the American Short Line and Regional Railroad Association, (filed Apr. 28, 2000) at 4. It should be noted that DMIR and many other Class II and Class III carriers are not small businesses that cannot afford to collect cost data. For example, in Minnesota Power, the defendant carrier DMIR was a large corporation itself and part of a larger corporate family (then Transtar). Transtar earned over \$500 million in annual revenues from its subsidiary railroad operations and was part of a larger multi-billion dollar corporate family (Blackstone Group). See Docket No. 42038, Minnesota Power, Inc.'s Reply to Defendant's Petition for Stay, (filed March 22, 2000) at 5.

¹⁰ See, e.g., STB Docket No. 42059, Northern States Power Company Minnesota d/b/a Xcel Energy v. Union Pacific Railroad Company (Complaint filed Jan. 26, 2001); STB Docket No. 42058, Arizona Electric Power Cooperative v. The Burlington Northern and Santa Fe Ry. and Union Pacific R.R. (Complaint filed Dec. 29, 2000); STB Docket No. 42057, Public Service Company of Colorado d/b/a Xcel Energy (Complaint filed Dec. 10, 2000).

declares it will use regional costs, both shippers and carriers will be required to use regional costs (adjusted only for movement-specific traffic and operating parameters). Alternatively, if a shipper states it will present carrier-specific unit costs, the Board should issue, as part of its initial scheduling order, an order similar to the order accompanying the Minnesota Power Decision.

To the extent that this issue ever arises again, WCTL believes a complainant shipper is likely to opt, for the sake of expediency, to use WCTL's regional-cost option. WCTL's regional-cost option would require shippers and carriers to use regional unit costs (if the shipper so elected) and preclude carriers from substituting upward adjustments to these unit costs. The only adjustments that would be permitted would be standard movement-specific traffic and operating statistic adjustments. Using this approach, shippers would be guaranteed not to be whip-sawed with a variety of carrier-sponsored upward adjustments in regional unit costs while simultaneously not being able to make corresponding downward adjustments.¹¹

However, the STB should not deprive a shipper of its right to obtain carrier-specific unit costs. The STB's predecessor, the ICC, in one of its decision exempting non-Class I carriers from USOA¹² recordkeeping requirements, warned these carriers not to "blind[ly] abandon" USOA accounting systems because such data could be needed in individual maximum rate adjudications.¹³ It appears that non-Class I railroads have failed

¹¹ WCTL is concerned that, as a practical matter, carriers will utilize (or develop) internal data that will allow them to upwardly adjust regional costs while not maintaining (or developing) data that could allow downward adjustments. WCTL's proposal thus levels the playing field.

¹² Uniform System of Accounts ("USOA").

¹³ Elimination of Accounting at 3.

to heed the ICC's directive. Shippers should not be punished as a result.¹⁴

The Board should not permit expediency to trump a shipper's right to obtain accurate costs -- particularly where the Congressionally-imposed maximum rate case process ultimately depends upon the Board's development of accurate variable cost calculations¹⁵ -- without a shipper's advance approval.

CONCLUSION

WCTL requests that the Board modify the proposal set forth in its Notice in the manner described above.

Respectfully submitted

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Dated: July 1, 2002

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¹⁴ The Minnesota Power case illustrates this point. In the Minnesota Power Decision, the STB correctly held that the DMIR's-sponsored regional costs "are not representative of DMIR costs" and then held that making movement-specific adjustments to these costs would not produce "correct" results. Minnesota Power Decision at 5-7. The Board proceeded to order the DMIR to collect data it believed Minnesota Power needed to present DMIR-specific unit costs.

¹⁵ See, e.g., STB Docket No. 42051, Wisconsin Power and Light Company v. Union Pacific Railroad Company, (Decision served Sept. 13, 2001) at 33 (prescribing a maximum rate 180% of the defendant carrier's variable costs).